AO 241
(Rev. 01/15)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Utah, Northern
Name (under which you were convicted): Azlen Adieu Farquoit Marchet	Docket or Case No.:
Place of Confinement: UTAH STATE PRISON	Prisoner No.: 180623
Petitioner (include the name under which you were convicted): Azlen Adieu Farquoit Marchet v.	Respondent (authorized person having custody of petitioner): STATE of UTAH
The Attorney General of the State of: UTAH	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
3rd District Court SALT LAKE COUNTY
STATE OF UTAH

(b) Criminal docket or case number (if you know): 051902656

2. (a) Date of the judgment of conviction (if you know): 8-1-2007

(b) Date of sentencing: 10-5-2017

3. Length of sentence: 5 years to life

4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No

5. Identify all crimes of which you were convicted and sentenced in this case: RAPE

6. (a) What was your plea? (Check one)

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? ______________________

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: UTAh Court of Appeals

(b) Docket or case number (if you know): [illegible] [illegible] 20080186

(c) Result: Affirmed

(d) Date of result (if you know): July 30, 2009

(e) Citation to the case (if you know): state v. Marchet 2009 UT AP 262

(f) Grounds raised: The Jury was Not properly instructed as to the required mental state for the crime. Trial Counsel was ineffective for failing to request A mistake of fact instruction. Trial court erred in admitting the testimony of other women who claimed they were Also assaulted.

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: UTAh Supreme Court

(2) Docket or case number (if you know): ______________________

(3) Result: CERT Denied

(4) Date of result (if you know): About December 10, 2009

(5) Citation to the case (if you know): ____________________

(6) Grounds raised: ____________________

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): ____________________

(2) Result: ____________________

(3) Date of result (if you know): ____________________

(4) Citation to the case (if you know): ____________________

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: 3rd District Court Salt LAKE County STATE of UTAh

(2) Docket or case number (if you know): 110918502

(3) Date of filing (if you know): October 2011

(4) Nature of the proceeding: 65C Petition for Post Conviction Relief

(5) Grounds raised: error in Admission of 404(b) evidence, factual INNocence, ineffective Assistance of Appellate Counsel, improper jury question violation of the 8th Amendment

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes ☒ No Summary Judgment hearing

(7) Result: STATES Motion for Summary Judgment was Granted

(8) Date of result (if you know): JUNE 6, 2012

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: 3rd District Court Salt Lake County State of UTAH

(2) Docket or case number (if you know): 140905584

(3) Date of filing (if you know): August 13, 2014

(4) Nature of the proceeding: 65C

(5) Grounds raised: ineffective Assistance of counsel, ineffective assistance of Appellate counsel, prosecutorial misconduct Brady violations Trial court erroneously admitted 404(b) evidence

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes ☒ No summary Judgment hearing

(7) Result: States Motion for Summary Judgment was Granted

(8) Date of result (if you know): July 10, 2015

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: 3rd District Court Salt Lake County State of UTAH

(2) Docket or case number (if you know): 150905482

(3) Date of filing (if you know): August 7, 2015

(4) Nature of the proceeding: 65C

(5) Grounds raised: ineffective Assistance of Counsel, ineffective Assistance of Appellate Counsel, prosecutorial misconduct Brady Violations Trial court erroneously admitted 404(b) evidence

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: Dismissed

(8) Date of result (if you know): __________

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☒ Yes ☐ No

(3) Third petition: ☐ Yes ☒ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

The Court said the issue I was trying to preserve was already barred

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Prosecutorial Misconduct

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

In the case the prosecutor presented witnesses that had been placed in contact with one another two years prior as complete strangers with similar stories. Prosecutorial misconduct

(b) If you did not exhaust your state remedies on Ground One, explain why: __________

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? [ ] Yes [X] No

(2) If you did not raise this issue in your direct appeal, explain why: My Appellate Counsel was ineffective and failed to review this portion of the Police report

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 65C [illegible] Petition

Name and location of the court where the motion or petition was filed: 3rd District Salt Lake County State of Utah

Docket or case number (if you know): 140905584

Date of the court's decision: July 10, 2015

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? [ ] Yes [X] No

(4) Did you appeal from the denial of your motion or petition? [X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? [X] Yes [ ] No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Utah Court of Appeals

Docket or case number (if you know): 20151024-CA

Date of the court's decision: February 11, 2016

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: motion For rehearing

GROUND TWO: The Judge allowed A witness to testify that I had Already had A trial with AN been Aquitted. Improper 404(b)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

When the Judge reviewed the Testimony of the witness to Compair it to the other witnesses he did NoT review the trial testimony where she admitted to police that I Asked for Consent

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: My Appellate Counsel was INeffective AND Never SAW The Trial testimony of this witness

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 65C Petition

Name and location of the court where the motion or petition was filed: 3rd District Court Salt Lake County State of UTAh

Docket or case number (if you know): 140905584

Date of the court's decision: July 10, 2015

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Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: UTAh Court of Appeals

Docket or case number (if you know): 20151024-CA

Date of the court's decision: February 11, 2016

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : NONe

GROUND THREE: Ineffective Assistance of Counsel And Appellate Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

My Trial Attorney did Not have the Judge review the trial testimony AND my Appellate counsel didn't even have the trial testimony to raise the issue on Appeal As well As the other mistakes/Grounds I'm Citing.

(b) If you did not exhaust your state remedies on Ground Three, explain why: ______________________

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: My Appellate Counsel chose Not too

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 65C Petition

Name and location of the court where the motion or petition was filed: 3rd District Court SAlt LAke County State of UTAh

Docket or case number (if you know): ~~[illegible]~~ ~~[illegible]~~ 140905584

Date of the court's decision: ______________________

Result (attach a copy of the court's opinion or order, if available): ______________________

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: UTAh Court of Appeals

Docket or case number (if you know): 20151024-CA

Date of the court's decision: February 11, 2016

Result (attach a copy of the court's opinion or order, if available): ______________________

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: NoNe

GROUND FOUR: Violation of My AquitAl

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

IN my first trial the state was Not allowed to call witnesses From other unrelated cases. During cross examination the prosecutor Asked the witness what was the result of her trial she replied that I was Aquitted. then he asked if the two other witnesses were allowed to testify at her trial to which she replied "NO" which gave the jury the impression that the only reason there was an AquitAl was because the witnesses didn't testify

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: my Appellate counsel was iNeffective

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 65C petition

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: that my conviction is overturned

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on ________ (month, date, year).

Executed (signed) on MAY 2017 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

219 P.3d 75
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Azlen Adieu Forquoit MARCHET,
Defendant and Appellant.

No. 20080186–CA. | Sept. 17, 2009.

Synopsis
Background: Defendant was convicted in a jury trial in the Third District, Salt Lake Department, Robert K. Hilder, J., of rape. Defendant appealed.

Holdings: The Court of Appeals, McHugh, J., held that:

[1] trial court's instructions adequately informed jury on State's burden of proof as to defendant's mental state;

[2] trial counsel's failure to request mistake of fact instruction was not ineffective assistance;

[3] evidence of two other rapes was offered for the noncharacter purpose of proving lack of consent;

[4] evidence of other rapes was relevant to prove lack of consent;

[5] probative value of other rapes was not outweighed by its prejudicial effect; and

[6] trial court properly instructed jury on limits to its consideration of bad acts evidence.

Affirmed.

Attorneys and Law Firms

*77 Ronald J. Yengich and Elizabeth Hunt, Salt Lake City, for Appellant.

Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee.

Before Judges THORNE, BENCH, and McHUGH.

AMENDED OPINION [1]

1 This Amended Opinion replaces the Opinion issued on July 30, 2009, in this matter.

McHUGH, Judge:

¶ 1 Azlen Adieu Forquoit Marchet appeals from a conviction for rape, a first degree felony, *see* Utah Code Ann. § 76–5–402 (2008). [2] Marchet contends that the trial *78 court did not properly instruct the jury as to the required mental state for the crime of rape. He also claims that his trial counsel was ineffective in failing to request a mistake of fact instruction. Finally, he argues that the trial court erred in admitting the testimony of other women who alleged that Marchet had raped them. *See generally* Utah R. Evid. 404(b) (stating that evidence of the defendant's other bad acts may be admitted in certain circumstances). We affirm.

2 Because the portions of the Utah Code relevant to our opinion are unchanged from the version in effect at the time this matter arose, we cite to the current version of the code for the convenience of the reader.

BACKGROUND

¶ 2 On April 29, 2005, Marchet was charged by information with the rape of B.F., committed during the fall of 2002. The State moved to admit testimony from three other women who claimed that Marchet had also raped them. The State argued that the admission of this testimony was proper under rule 404(b) of the Utah Rules of Evidence. Judge Timothy R. Hanson disagreed and denied the State's motion.

¶ 3 The case was later assigned to Judge Robert K. Hilder, and the State renewed its motion to admit testimony from three of Marchet's accusers, including evidence from two women whose testimonies were not offered in the State's first motion to Judge Hanson. The State argued that admission of the testimony was proper to show Marchet's intent, preparation, plan, knowledge, absence of mistake or accident, and B.F.'s lack of consent. During the evidentiary hearings on the motion, the trial court heard testimony from B.F. and from two other alleged victims, M.P. and N.R. The court also reviewed the transcript from the unsuccessful prosecution of a prior rape charge against Marchet, including the testimony of J.C., the complainant in that case.

¶ 4 After comparing the witnesses' testimony, Judge Hilder identified factual similarities between B.F.'s allegations and the allegations of M.P., J.C., and N.R. Of those similarities, the trial court highlighted four that it found particularly probative of the issue of consent: (1) Marchet's initial charm, followed by persistence and the exercise of physical power; (2) escalation in the intensity of his sexual advances, which all occurred in Marchet's home shortly after meeting; (3) forceful removal of the women's clothing after he was told to stop; and (4) penetration from behind during the sexual encounter. The court granted the State's motion to admit testimony from M.P. and J.C., but excluded the testimony of N.R. [3]

3 The trial court's decision to exclude N.R.'s testimony appears to be based upon the risk of overriding hostility by the jury as a result of the facts unique to that encounter with Marchet.

¶ 5 During its opening statement, the State informed the jury that testimony from the other women would be presented to show that Marchet "had a set plan." The State explained that the jury could also consider the testimony "to decide if [B.F.] did[ ] or did not consent to sexual intercourse with [Marchet]."

B.F.'s Testimony

¶ 6 At trial, B.F. testified that she met Marchet at a Salt Lake City dance club in the fall of 2002. B.F. noted that Marchet weighed approximately 250 pounds and was well over six feet tall, while she weighed 120 pounds and was five feet five inches tall. Marchet was friendly and repeatedly requested that B.F. come to his home. B.F. refused but invited Marchet to join her at the home of her friend, Vhanessa. Marchet followed B.F. and Vhanessa to a gas station where he left his car and rode in B.F.'s car to Vhanessa's home.

¶ 7 While at Vhanessa's home, B.F. claimed she had no sexual contact with Marchet. Although Marchet continued to invite B.F. to accompany him to his home, she refused. Around 3:00 a.m., she agreed to drive him back to his car. Their route took them past where Marchet had left his car, but he directed her to his apartment instead. Marchet then persuaded B.F. to come inside. Upon entering the apartment, B.F. put her cell phone and car keys in clear view on the coffee table or couch in the living room.

¶ 8 Marchet took B.F. upstairs to his bedroom to watch a movie. B.F. sat on Marchet's *79 bed, which was the only piece of furniture in the room. Marchet pushed B.F. back onto the bed and began trying to remove her clothing. When B.F. protested, Marchet said, "You know you want this." After lowering B.F.'s pants to her knees, Marchet left the room to get a condom. B.F. pulled up her pants, and when Marchet reentered the room, she told him that she did not want to have sex with him. At that point, Marchet used his body weight to restrain B.F. while he undressed and raped her. During the rape, Marchet positioned B.F. to penetrate her from behind.

¶ 9 When B.F. got up to dress, Marchet insisted on walking B.F. to her car. On her way out, B.F. grabbed her car keys, which were in plain view, but did not see her cell phone. Marchet then pulled her cell phone from under a couch cushion. Marchet acted like "a perfect gentleman" as he walked B.F. to her car; he told B.F. that it did not have to be a "one night stand" and that he would call her later. B.F. responded that he did not have to call. Although B.F. told Vhanessa about the rape the next day, she did not report it to authorities until 2005, over two years after the incident.

M.P.'s Testimony

¶ 10 The State introduced the testimony of M.P. in support of B.F.'s allegations that her sexual intercourse with Marchet was nonconsensual. M.P. testified that she met Marchet, who introduced himself as Cody, at a dance club in July 2004. Shortly after meeting, Marchet asked M.P. on a date and she told him, "no." However, Marchet was "very persistent" and persuaded her to go to his house that night to watch a movie.

¶ 11 When M.P. entered Marchet's home, she placed her purse and cell phone on the coffee table in the living room. Marchet told M.P. that the only television in the house was in his bedroom. Once in his bedroom, Marchet turned on a movie while M.P. sat on the edge of the bed. Marchet lay down next to M.P. and pulled her into a "spooning" position with his chest to M.P.'s back. When he began to kiss M.P.'s shoulders and back, M.P. told him to stop. Marchet then reached forward, removed M.P.'s pants, and began to rape her, penetrating her from behind. M.P. repeatedly told him to stop. Marchet became increasingly forceful, using his body weight to restrain M.P. At some point, the condom Marchet was wearing fell off and M.P. noticed it had blood on it. After the rape, M.P. attempted to dress, but Marchet pulled her back onto his bed to "cuddle." When M.P. protested, Marchet began raping her again.

¶ 12 As she prepared to leave, M.P. found her purse where she left it on the coffee table, but she did not see her cell phone. Marchet then removed her phone from behind a couch cushion. M.P. went home and bathed. In the morning she called her neighbor, a Sandy City police officer, and reported the rape.

J.C.'s Testimony

¶ 13 The State also offered the testimony of J.C. as evidence in the trial on the charges stemming from B.F.'s allegations. J.C. testified that she met Marchet at a downtown bar in March 2005; she gave him her telephone number. Marchet called her the next day and said his name was Cody. J.C. agreed to meet Marchet at his home later that evening. When J.C. arrived at Marchet's home, he suggested that they watch a movie. J.C. agreed, although she told him she had plans to meet friends and could not stay long.

¶ 14 Marchet took her to his bedroom to watch the movie and J.C. sat on the edge of the bed. Marchet lay next to J.C. and put his hand on her thigh. J.C. told Marchet she "didn't feel comfortable with that and pushed [his hand] off." Marchet then pulled J.C. into a "spooning" position. After several minutes of lying in that position, Marchet attempted to remove J.C.'s pants, and J.C. pulled them back on. Marchet then became aggressive, restraining J.C. while he removed her clothing. He positioned J.C.'s body so she was "on all fours" and began to rape her. Marchet pulled J.C.'s hair, forcing her to look into a mirror while he raped her. When she closed her eyes, he bit her until she opened them. J.C. claimed she did not verbally protest during the rape because she was afraid of Marchet. After J.C. dressed, Marchet walked her to her car and kissed ***80** her on the mouth. J.C. reported the rape to authorities the next day. [4]

4 Marchet was tried and acquitted of rape charges based upon his encounter with J.C. Neither B.F. nor M.P. was permitted to testify at that trial.

Marchet's Testimony

¶ 15 Marchet also testified at trial. He agreed that he and B.F. had sexual intercourse but claimed it had been consensual. He stated that he and B.F. "kissed" and had "sexual contact" while at Vhanessa's house. Marchet testified that he and B.F. then left for his home, went directly to his bedroom, and engaged in consensual sexual intercourse. He claimed that at 7:45 that morning he and B.F. picked up his car and then returned to his apartment and had sex again. Marchet stated that he and B.F. had "textbook sex" that night but because she did not return his calls, they did not go out again.

¶ 16 During closing argument, the prosecutor reminded the jury that they were "entitled to consider the testimony of M[.P.] and ... J[.C.] in assessing whether or not [B.F.] consented [and] in assessing [Marchet's] plan." The State added that the testimony of M.P. and J.C. could be relied on for purposes of "show[ing] intent, ... absence of mistake [and,] ... that B[.F.] did not consent to having sex with [Marchet]." Marchet was convicted of rape, and this appeal followed.

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 17 On appeal, Marchet contends that the trial court incorrectly instructed the jury as to the proper mental state for the consent element of the crime of rape. "Whether a jury instruction correctly states the law presents a question of law which we review for correctness." *State v. Houskeeper*, 2002 UT 118, ¶ 11, 62 P.3d 444.

[2] ¶ 18 Marchet also claims that his trial counsel rendered ineffective assistance by failing to request a mistake of fact instruction. "Where, as here, a claim of ineffective assistance of counsel is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law." *State v. Chavez–Espinoza*, 2008 UT App 191, ¶ 8, 186 P.3d 1023 (internal quotation marks omitted), *cert. denied*, 199 P.3d 367 (Utah 2008).

[3] ¶ 19 Marchet further argues that the trial court erred by admitting the testimony of M.P. and J.C. "[W]e review a trial court's decision to admit evidence under rule 404(b) of the Utah Rules of Evidence under an abuse of discretion standard." *State v. Nelson–Waggoner*, 2000 UT 59, ¶ 16, 6 P.3d 1120. In doing so, "[w]e review the record to determine whether the admission of other bad acts evidence was scrupulously examined by the trial judge in the proper exercise of that discretion." *Id.* (internal quotation marks omitted).

ANALYSIS

I. Jury Instructions

A. Marchet's Proposed Instruction

[4] ¶ 20 At trial, Marchet proposed an instruction that would have told the jury to acquit if it found Marchet had a good faith belief that B.F. consented to sexual intercourse. The trial court rejected that instruction because it might confuse the jury into thinking that Marchet's mental state should be evaluated on a subjective, rather than an objective, basis. Instead, the trial court proposed Instruction 16, which states,

> In the crime of rape, the required mental state must exist at the time of the commission of the crime. The crime of rape requires that the defendant acted intentionally, knowingly, or recklessly. Those mental states are defined in these Instructions, and the State must prove the existence of the required mental state beyond a reasonable doubt. Therefore, if after a consideration of all the evidence you have a reasonable doubt that the defendant had the necessary intent at the time of the sexual intercourse, you must find him not guilty of rape.

Marchet's trial counsel approved this instruction as a "fair compromise." Because the record does not contain the language of Marchet's proposed instruction, *see Hansen v. Stewart,* 761 P.2d 14, 17 (Utah 1988) (refusing *81 to consider challenge to jury instructions where copies of proposed instructions were not part of the record); *State v. Morgan,* 865 P.2d 1377, 1379 n. 1 (Utah Ct.App.1993) ("We cannot review the denial of a requested instruction unless it is included in the record."), and because trial counsel approved the instruction proposed by the court, *see State v. Harmon,* 956 P.2d 262, 269 (Utah 1998) (noting that defense counsel waives any right to challenge a jury instruction on appeal, if he approves it in the trial court), we do not consider this argument further.

B. Required Mental State

[5] ¶ 21 Marchet next argues that the trial court erred by instructing jurors that they could convict him of rape if they found the following beyond a reasonable doubt:

> 1. That on or about October 1, 2002 through November 30, 2002, in Salt Lake County, State of Utah, the defendant, Azlen Adieu [Forquoit] Marchet, had sexual intercourse with B[.F.]; and
>
> 2. That said act of intercourse was without the consent of B[.F.]; and
>
> 3. That the defendant acted intentionally or knowingly or recklessly.

Marchet contends that the language of this instruction—Instruction 13—does not adequately inform the jury that the State had the burden of proving his mental state with regard to each element of the crime of rape. Specifically, Marchet claims that the instruction "did not require the jury to find any mental state on [Marchet's] part with regard to B.F.'s consent or lack thereof."

¶ 22 Utah Code section 76–5–402 defines the crime of rape as consisting of two elements: (1) the act of sexual intercourse (2) committed without the other person's consent. *See* Utah Code Ann. § 76–5–402 (2008). Utah Code section 76–2–101(1) provides the necessary mental state: "A person is not guilty of an offense unless the person's conduct is prohibited by law [ ] and ... the person acts intentionally, knowingly, [or] recklessly...." *Id.* § 76–2–101(1). Contrary to Marchet's assertions, Instruction 13 accurately identified each element of the crime of rape and correctly stated the applicable mental state. The jurors were instructed that to convict Marchet, they must find beyond a reasonable doubt that he intentionally, knowingly, or recklessly had nonconsensual sexual intercourse with B.F. The instruction is an accurate statement of the law, and we reject Marchet's claim that it was erroneous.

[6] [7] ¶ 23 Furthermore, "[w]e review a challenged jury instruction in context with all other jury instructions provided to the jury." *Normandeau v. Hanson Equip., Inc.,* 2007 UT App 382, ¶ 16, 174 P.3d 1, *rev'd on other grounds,* 2009 UT 44. Where "the jury instructions as a whole fairly instruct the jury on the applicable law, reversible error does not arise merely because one jury instruction, standing alone, is not as accurate as it might have been." *Id.* (internal quotation marks omitted); *see also State v. Harper,* 2006 UT App 178, ¶ 14, 136 P.3d 1261 ("[I]f taken as a whole [the jury instructions] fairly instruct the jury on the law applicable to the case, the fact that one of the instructions, standing alone, is not as accurate as it might have been is not reversible error." (first alteration in original) (internal quotation marks omitted)). Here, the jurors were also instructed that "the required mental state must exist at the time of the commission of the crime"

and that if they had "reasonable doubt that the defendant had the necessary intent at the time of the sexual intercourse, [they] must find him not guilty of rape." We believe that the instructions as a whole communicated to the jury that Marchet was guilty of rape not simply if he knowingly, intentionally, or recklessly had sexual intercourse with B.F., but only if he knowingly, intentionally, or recklessly did so without B.F.'s consent. If the circumstances were such that B.F.'s conduct objectively conveyed consent, rather than lack of consent, at the time of the sexual intercourse, the jury instructions adequately informed the jurors that they could not find that Marchet possessed the minimum criminal mental state of recklessness.[5] Therefore, we hold that the *82 jury was properly informed both as to the elements of the crime and the required mental state.

5 The jury was instructed

> A person engages in conduct recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustified risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

II. Ineffective Assistance of Counsel

[8] [9] ¶ 24 Marchet next argues that his trial counsel rendered ineffective assistance by failing to request a mistake of fact instruction. To prevail on an ineffective assistance claim, Marchet bears the burden of establishing each of the components of the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Nicholls v. State*, 2009 UT 12, ¶ 36, 203 P.3d 976. "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Furthermore, "proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Nicholls*, 2009 UT 12, ¶ 36, 203 P.3d 976 (internal quotation marks omitted).

¶ 25 Utah Code section 76–2–304(1) states, "Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime." Utah Code Ann. § 76–2–304(1). Marchet claims that under his theory of the case, the jurors should have been instructed that he mistakenly believed B.F. consented to sexual intercourse.

¶ 26 We agree with the State that a mistake of fact instruction would have been inconsistent with Marchet's defense at trial. Marchet testified that he and B.F. engaged in sexual contact at Vhanessa's house and that later B.F. willingly accompanied him to his apartment, where the couple immediately retired to his bedroom and had "textbook sex." Marchet further claimed that the next morning he and B.F. left his apartment to retrieve his car and then returned and engaged in consensual sexual relations again. Effectively, Marchet testified that B.F. was not truthful at trial and that she enthusiastically consented to repeated incidents of sexual intercourse with him. Marchet argued that his interaction with B.F. was consistent with casual sexual encounters practiced routinely in this state and throughout the country. According to Marchet, there was nothing about his encounter with B.F. that gave him reason to suspect anything was amiss.

¶ 27 Assuming that the jurors resolved the contest of credibility in favor of Marchet, there would be no need for a mistake of fact instruction and the use of one may have weakened his defense. In contrast, if the jury believed B.F.'s version of the facts, there is nothing in section 76–2–304(1) that would allow Marchet to ignore the fact that B.F. put her clothes back on while he was out of the room and unambiguously indicated that she did not want to have sex with him. *See generally* Utah Code Ann. § 76–5–406(1) (2008) ("An act of ... rape ... is without consent of the victim [where] ... the victim expresses lack of consent through words or conduct...."). Under these circumstances, trial counsel reasonably could have concluded that a mistake of fact instruction had no place in Marchet's defense. *See State v. Pecht*, 2002 UT 41, ¶ 41, 48 P.3d 931 ("A defendant cannot prevail on a claim of ineffective assistance of counsel where 'the challenged act o[r] omission might be considered sound trial strategy.' " (quoting *State v. Parker*, 2000 UT 51, ¶ 10, 4 P.3d 778)). Consequently, we conclude that Marchet has not met his burden to show that trial counsel's performance was deficient. Therefore, we need not reach the second part of the *Strickland* test in concluding that his ineffective assistance of counsel argument fails. *See Nicholls*, 2009 UT 12, ¶ 40, 203 P.3d 976 ("Because Nicholls has failed to satisfy the first prong of *Strickland*, we need not reach the second prong—that Nicholls was prejudiced by his counsel's performance.").

III. Rule 404(b) Analysis

¶ 28 Rule 404(b) of the Utah Rules of Evidence instructs that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to *83 show action in conformity therewith." Utah R. Evid. 404(b). However, rule 404(b) does allow for the admission of bad acts evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Thus, "evidence ... offered under [rule] 404(b)[ ] is admissible if it is relevant for a non-character purpose and meets the requirement of Rules 402 and 403 [of the Utah Rules of Evidence]." *Id.* R. 404 advisory comm. note.

[10] ¶ 29 A decision as to the admissibility of bad acts evidence involves a three-step process. First, "the trial court must ... determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b)." *State v. Nelson–Waggoner*, 2000 UT 59, ¶ 18, 6 P.3d 1120. In contrast, if the trial court concludes that the bad acts evidence is "being offered only to show the defendant's propensity to commit crime, then it is inadmissible and must be excluded at that point." *Id.* If the purpose is deemed proper, "the court must [next] determine whether the bad acts evidence meets the requirements of rule 402, which permits admission of only relevant evidence." *Id.* ¶ 19. Last, the court must analyze the evidence in light of rule 403 to assess whether its probative value is substantially outweighed by the risk of unfair prejudice to the defendant. *See id.* ¶ 20.

¶ 30 We review the trial court's decision to admit evidence pursuant to rule 404(b) under an abuse of discretion standard. *See id.* ¶ 16. In performing that analysis, we "review the record to determine whether the admission of other bad acts evidence was scrupulously examined by the trial judge in the proper exercise of that discretion." *Id.* (internal quotation marks omitted). [6]

6 In *State v. Nelson–Waggoner*, 2000 UT 59, 6 P.3d 1120, the Utah Supreme Court reaffirmed its departure from its approach in past decisions to undertake the "close review" of the admission of bad acts evidence under a "limited deference" standard. *Id.* ¶ 16 & n. 5.

A. Noncharacter Purpose

[11] ¶ 31 The State argued that the admission of M.P.'s and J.C.'s testimonies was proper for purposes of proving (1) that Marchet intended to rape B.F.; (2) that he had a specific plan, scheme, or modus operandi; (3) that his actions were not the result of a mistake or accident; and (4) that B.F. did not consent. At trial, the court instructed the jurors that they could consider testimony from M.P. and J.C. in making a determination as to "whether or not B [.F.] ... consented to sexual intercourse." Marchet claims that the admission of that testimony constituted prejudicial error. [7] Although we are sympathetic to Marchet's concerns about the impact of M.P.'s and J.C.'s testimonies, we hold that this evidence was "scrupulously examined by the trial judge in the proper exercise of [his] discretion." *Id.* ¶ 16 (internal quotation marks omitted).

7 On appeal, Marchet also argues that rule 412 of the Utah Rules of Evidence, which prohibits a defendant from bringing in evidence of the alleged victim's sexual behavior with third persons, *see* Utah R. Evid. 412, should likewise prevent the State from presenting evidence of the defendant's sexual activities with third parties. However, this issue was not preserved in the trial court, and we do not consider it further. *See generally* Utah R.App. P. 24(a)(5)(A) (requiring citation to the record showing an issue was preserved in the trial court).

¶ 32 Rule 404(b) of the Utah Rules of Evidence specifically identifies intent, plan, and absence of mistake or accident as proper noncharacter purposes justifying the admission of bad acts evidence. *See* Utah R. Evid. 404(b). The Utah Supreme Court considered the proper application of rule 404(b) under facts similar to those present here in *State v. Nelson–Waggoner*, 2000 UT 59, 6 P.3d 1120. There, the defendant was accused of raping several women; the charges were tried separately. *See id.* ¶ 2.

¶ 33 At *Nelson–Waggoner's* first trial, the State moved to admit the testimony of his other accusers for the purpose of demonstrating lack of consent. *See id.* ¶ 3. The State identified ten similarities among the alleged rapes, including that the defendant invited each woman to his dorm room and raped her there by "forcing [the woman's] legs over his shoulders [and] bending her body in half so her knees were near her head *84 in a confining position that hurt and made it difficult for her to breathe or cry out for help." *Id.* The trial court denied the State's motion in the first trial, and the defendant was acquitted. *See id.* ¶ 4.

¶ 34 Prior to the defendant's second trial, rule 404(b) was clarified and amended [8] and the State again moved to admit evidence from the defendant's other accusers. *See id.* ¶ 5. The trial court held that the evidence was admissible for purposes of demonstrating the defendant's modus operandi and the accuser's lack of consent, "so long as each victim's testimony met six of the ten factual similarities" the State had identified. *Id.* Ultimately, two of the other women were permitted to testify at the second trial, *see id.* ¶ 6, and the defendant was convicted, *see id.* ¶ 14.

8 The February 11, 1998 amendment to rule 404(b) of the Utah Rules of Evidence rejected the judicially-created presumption articulated in *State v. Doporto,* 935 P.2d 484 (Utah 1997), that bad acts evidence was inadmissible unless the trial court made additional findings, *see id.* at 490 (superseded by Utah R. Evid. 404(b) (as amended)); *see also State v. Decorso,* 1999 UT 57, ¶ 13, 993 P.2d 837 (acknowledging that the amendment to rule 404(b) served to abandon additional requirements), and clarified that extrinsic evidence must meet the requirements of rules 402 and 403 of the Utah Rules of Evidence. *See Nelson–Waggoner,* 2000 UT 59, ¶ 5 nn. 2–3, 6 P.3d 1120.

¶ 35 On appeal, the Utah Supreme Court upheld the trial court's ruling. *See id.* ¶ 25. In doing so, the supreme court noted that although it "is not conclusive proof that the [alleged victim] did not consent," bad acts evidence "is both relevant and material to the issue of consent and therefore properly admissible," "especially ... when a defendant allegedly obviates the victim's consent in a strikingly similar manner in several alleged rapes." *Id.* ¶ 24 (internal quotation marks omitted). The supreme court concluded that the extrinsic evidence "laid out a pattern of behavior" that was consistent with the defendant's behavior toward his accuser. *Id.* ¶ 25. Furthermore, the distinctive sexual position common in each of the alleged rapes "suggest[ed] that the women did not consent to [the] defendant's pattern of behavior—including intercourse—while he held them in th[at] position." *Id.*

¶ 36 Here, in granting the State's motion, the trial court commented, "[T]his is very close to *Nelson–Waggoner.* ... I think I would be deviating substantially from the law set forth by our Supreme Court in 2000 if I do not allow one or two of these witnesses." Marchet argues that his case can be distinguished from *Nelson–Waggoner* because there the distinctive sexual position itself was indicative of the lack of consent. He contends that the same is not true in this case and that therefore, the trial court's reliance on *Nelson–Waggoner* was misplaced.

[12] ¶ 37 We agree with Marchet that *State v. Nelson–Waggoner,* 2000 UT 59, 6 P.3d 1120, is not so factually identical as to "compel the admission of the extrinsic crime evidence in this case." There is nothing so unusual or so inherently uncomfortable about the sexual position described by Marchet's accusers that infers lack of consent standing alone. However, we also do not read *Nelson–Waggoner* as compelling the exclusion of bad acts evidence in the absence of such a unique position. While the supreme court relied heavily on the unusual and uncomfortable sexual position described by *Nelson–Waggoner's* accusers in affirming the trial court's decision to admit the testimony, *see id.* ¶ 25 ("That defendant engaged in this distinctive behavior with both [the victim] and the two witnesses, ... makes this evidence probative as to the issue of consent."), it did not limit the admission of bad acts evidence to cases involving a distinctly uncomfortable sexual position.

¶ 38 Rather, the *Nelson–Waggoner* court explained that the traditional assumption that evidence of other rapes was not probative had changed so that, more recently, this type of evidence "has been admitted for the noncharacter purpose of proving the element of lack of consent in certain rape trials." *Id.* ¶ 24. The supreme court further explained, "This is especially true when a defendant allegedly obviates the victim's consent in a strikingly similar manner in several alleged rapes." *Id.* Applying this modern approach, the supreme court referred to the defendant's consistent pattern of behavior described ***85** by each of his accusers. *See id.* ¶ 25. Although the supreme court found the evidence of the distinctive sexual position compelling on the issue of lack of consent, there is nothing in the decision that suggests that the consistent pattern of behavior employed by a defendant must always include a distinctive sexual position. Instead, the supreme court held that the trial court must scrupulously review the evidence to determine whether the evidence of other bad acts sets forth a pattern of behavior consistent with the pattern of behavior the defendant engaged in with his present accuser to obviate consent. *See id.* ¶¶ 16, 25. If the trial court engages in a scrupulous examination, its decision will be upheld unless the trial court exceeds its discretion. *See id.* ¶ 16.

¶ 39 In this case, the trial court carefully compared the testimony of each woman, finding a pattern of behavior detailed by M.P. and J.C. that it viewed as consistent with

Marchet's actions toward B.F. Before granting the State's motion, the trial court heard or reviewed testimony from each witness. It first identified nine factual similarities among their accounts and then further refined its analysis to isolate the behaviors it found particularly probative of the issue of consent. Those commonalities include the escalation in the intensity of Marchet's sexual advances coupled with his size and strength, forceful removal of the women's clothing, and penetration from behind during the sexual encounter. Although the trial court contemplated the likelihood that "these women were all consenting to the same sex and the same position," we see no indication that the trial court relied on the common sexual position as implicitly suggestive of nonconsent by itself. Instead, viewing the evidence cumulatively, the trial court found a pattern of consistent behavior by Marchet that obviated each woman's consent.

¶ 40 After scrupulously examining the bad acts evidence, the trial court concluded that it was offered for the noncharacter purpose of proving lack of consent. [9] We hold that the trial court did not exceed its discretion in reaching that conclusion.

9 We do not agree with Marchet that the trial court abdicated its role as the arbiter of the admissibility question by blind adherence to *Nelson–Waggoner*. Although the trial court expressed concern about the impact of the bad acts evidence in light of its conclusion that the supreme court's decision was controlling, it engaged in precisely the analysis required. Indeed, the trial court excluded the testimony of N.R. and only admitted M.P.'s and J.C.'s testimonies after multiple hearings and careful comparison of the commonalities between their allegations and those of B.F.

B. Relevance Under Rule 402

[13] ¶ 41 Bad acts evidence is subject to a relevance analysis under rule 402 of the Utah Rules of Evidence. *See id.* ¶ 19. Rule 402 permits the admission of relevant evidence, *see* Utah R. Evid. 402, while rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," *id.* R. 401. The Utah Supreme Court has explained, "[U]nless the other crimes evidence tends to prove some fact that is material to the crime charged—other than the defendant's propensity to commit crime—it is irrelevant and should be excluded by the court pursuant to rule 402." *State v. Decorso*, 1999 UT 57, ¶ 22, 993 P.2d 837.

¶ 42 In *State v. Nelson–Waggoner*, 2000 UT 59, 6 P.3d 1120, the supreme court held that the "evidence of [the] defendant's bad acts was relevant to whether the alleged victim consented to having sexual intercourse." *Id.* ¶ 27. As in *Nelson–Waggoner*, Marchet admitted that he and his accuser had sexual intercourse, making consent the only contested element of the crime charged. *See* Utah Code Ann. § 76–5–402 (2008) ("A person commits rape when the actor has sexual intercourse with another person without the victim's consent."); *see also Nelson–Waggoner*, 2000 UT 59, ¶ 27, 6 P.3d 1120 (stating that "[consent] was the only issue at trial, since [the] defendant admitted to having sexual intercourse with [the victim]" (emphasis omitted)). Because the testimonies of M.P. and J.C. had some tendency to make the existence of B.F.'s consent "more probable or less probable than it would be without the evidence," Utah R. Evid. 401, they were ***86** relevant to the issue of consent, *see id.* R. 402.

C. Rule 403 Analysis

[14] ¶ 43 Finally, we must consider whether the trial court exceeded its discretion in concluding that the testimonies from M.P. and J.C. were admissible under rule 403 of the Utah Rules of Evidence. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* R. 403.

[15] **[16]** ¶ 44 "Rule 403 does not require a trial court to dismiss all prejudicial evidence because '[a]ll effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered.' " *State v. Killpack*, 2008 UT 49, ¶ 53, 191 P.3d 17 (alteration in original) (quoting *Woods v. Zeluff*, 2007 UT App 84, ¶ 7, 158 P.3d 552). However, the trial court must take special care in admitting evidence of a defendant's other bad acts. In *State v. Shickles*, 760 P.2d 291 (Utah 1988), the Utah Supreme Court identified guiding factors to be considered in balancing the probative value of bad acts evidence against "[i]ts tendency to lead the finder of fact to an improper basis for decision." *Id.* at 295. The *Shickles* factors include

> "[1] the strength of the evidence as to the commission of the other crime, [2] the similarities between the crimes, [3] the interval of time that has

> elapsed between the crimes, [4] the need for the evidence, [5] the efficacy of alternative proof, and [6] the degree to which the evidence probably will rouse the jury to overmastering hostility."

Id. at 295–96 (quoting E. Cleary, *McCormick on Evidence* § 190, at 565 (3d ed.1984)). After considering each of these *Shickles* factors, the trial court concluded that the probative value of the evidence was sufficient to overcome any unfair prejudice to Marchet.

¶ 45 First, the strength of the evidence was great. Both M.P. and J.C. testified in person at trial and were available for cross-examination.[10] Second, as discussed above, the trial court scrutinized the similarities among those allegations. Although the State sought the admission of testimony from three of Marchet's other accusers, the court ultimately concluded that only the events detailed by M.P. and J.C. could be presented to the jury. Third, the trial court considered the time between the alleged rapes. The court determined that despite B.F.'s testimony that Marchet raped her more than a year prior to M.P. and more than two years prior to J.C., the evidence was sufficiently proximate to warrant its admission.[11] *Cf. State v. Decorso,* 1999 UT 57, ¶ 32, 993 P.2d 837 (describing a seven-month interval between alleged crimes as "relatively short"); *State v. O'Neil,* 848 P.2d 694, 701 (Utah Ct.App.1993) (calling a three-year span between the defendant's earlier conviction and the alleged crime "a short period of time"). Fourth, the court considered the need for the extrinsic evidence where, without the testimonies of M.P. and J.C., the jury would be left to resolve "a contest of credibility" between Marchet and B.F. *See generally Nelson–Waggoner,* 2000 UT 59, ¶ 30, 6 P.3d 1120 (stating that issues of credibility created a need for bad acts evidence). Fifth, the only alternative proof of the central issue of consent was "the directly conflicting testimonies," *id.,* of B.F. and Marchet.

10 Marchet's trial counsel elected not to cross-examine these witnesses.

11 B.F. claimed that she was raped in October 2002. M.P. testified that Marchet raped her in July 2004, and J.C. testified that her rape occurred in March 2005. Although the trial court did not allow N.R. to testify at trial, the court noted her testimony that she was also raped in October or November 2002 while considering the timing of Marchet's alleged crimes.

¶ 46 Finally, the trial court determined that it could minimize the possibility that the evidence would "rouse the jury to overmastering hostility." *See Shickles,* 760 P.2d at 296. When Marchet's trial counsel bluntly expressed his concern about "putting on a bunch of white Mormon girls to cry in front of a jury about a black man," the court agreed that the potential for "overmastering ***87** hostility ... [was] a huge problem." However, the trial court concluded that it could "mitigate any unfair prejudice" by crafting a "very careful [jury] questionnaire on attitudes [and] race" and by "instruct[ing] the jury about what [the testimonies of M.P. and J.C. could] be used for." Indeed, throughout its consideration of the State's request to admit testimony from other alleged victims, the trial court exhibited a heightened awareness of the potential impact of such testimony, the need for it to be similar and relevant, and a commitment to select and instruct the jury so as to minimize any unfair prejudice to Marchet. *See generally* Utah R. Evid. 403 (allowing for the exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice").

¶ 47 At trial, the court instructed the jury as follows:

> You have heard evidence from two witnesses, J[.C.] and M[.P.], of other sexual assaults allegedly committed by the defendant, Mr. Marchet.[ ] You are instructed that Mr. Marchet was previously acquitted by a jury of the alleged offense against [J.C.] You are further instructed that Mr. Marchet has not been charged with an offense involving M[.P.], and he is presumed innocent of any such offense.
>
> You may use the evidence offered by the two witnesses only to help you decide whether Azlen Marchet had non-consensual sexual intercourse with B[.F.], the alleged victim in this case, and for no other purpose. The law does not allow you to convict Mr. Marchet or to punish him simply because you believe he may have done things, even bad things, not specifically charged as crimes in this case. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he has acted in this case in conformity with that character. The evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See generally State v. Nelson–Waggoner, 2000 UT 59, ¶ 9, 6 P.3d 1120 (quoting a similar jury instruction).

[17] ¶ 48 During deliberations, the jury indicated that it found the second paragraph of the instruction confusing. After discussing the jury's inquiry with counsel, the court gave a supplemental instruction, which clarified,

> 1. The evidence of [J.C.] and/or [M.P.] may be used by you to assist your determination whether or not B[.F.] consented to sexual intercourse. The last (fourth[)] sentence[ ] suggests some of the factors on which that testimony may bear as you consider that question, such as defendant's plan, his motive, his intent, etc. Any one or more, or none, of the factors may be established by the evidence. That is solely for you to decide.
>
> 2. The second sentence emphasizes that you may not consider any question of Mr. Marchet's legal responsibility for any alleged offense against [J.C.] or [M.P.] There are no charges against Mr. Marchet with respect to those witnesses today, and it would be a violation of your duty for you to make any decision that punishes him for any thing you may believe he did with either of these two women.
>
> 3. The third sentence emphasizes that you may draw no conclusions from the evidence regarding Mr. Marchet's character, and even if you harbor some conclusions about his character, it would be a violation of your duty to decide this case based on a conclusion that Mr. Marchet acted in this case in conformity with that character. In other words, you must decide this case based on the defendant's actions as determined by you, and not on any conclusion regarding his character; for example, you may not convict Mr. Marchet on the basis that you may find him to be a bad person.

Marchet argues that this supplementary instruction effectively gave jurors "carte blanche to consider the evidence for virtually any purpose." We disagree.

¶ 49 The initial instruction emphasized that the testimonies of M.P. and J.C. could be used for the sole purpose of determining ***88** whether B.F. consented to sexual intercourse. The jurors were expressly instructed to avoid making any determination of Marchet's guilt based on their beliefs about his character or the likelihood that he committed the offenses alleged by M.P. and J.C. The jurors were also correctly informed that they could consider other 404(b) purposes as they related specifically to the issue of consent. We are not convinced that the initial instruction "permitt[ed] virtually unlimited use of the extrinsic crime evidence."

[18] ¶ 50 Marchet further argues that the use of the abbreviation "etc." in the trial court's clarifying instruction removed all limitations from the jury's use of the bad acts evidence. We disagree. The clarifying instruction states in paragraph one: "The last (fourth[)] sentence[of the original instruction] suggests some of the factors on which that testimony may bear as you consider that question, such as defendant's plan, his motive, his intent, etc." While we agree that it would have been better not to include "etc." in the supplemental instruction, it was not error under these circumstances. Had the original instruction included a list of proper noncharacter purposes ending with etcetera, we might agree with Marchet that the jury's focus had not been properly limited. In this case, however, the clarifying instruction was discussing the original instruction and etcetera is a reference to the remainder of the list of the specific noncharacter purposes contained in the "last (fourth[)] sentence[ ]" of that prior instruction.[12] Considering the instructions as a whole, we conclude that the trial court properly instructed the jury on the limits to its consideration of the bad acts evidence.

12 The last sentence of the original jury instruction states, "The evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

¶ 51 The trial court carefully considered the probative value of the evidence under each of the *Shickles* factors, *see State v. Shickles,* 760 P.2d 291, 295–96 (Utah 1988). Furthermore, it instructed the jury as to the limited purpose for which the evidence was being offered. Therefore, admission of the bad acts evidence was proper under rule 403 and the trial court did not err in admitting the evidence under rule 404(b) of the Utah Rules of Evidence.

CONCLUSION

¶ 52 The trial court properly instructed the jury as to the elements of the crime of rape and the proper mens rea to convict Marchet for the crime. Marchet's trial counsel did not render ineffective assistance by failing to request a mistake of fact instruction. The trial court scrupulously examined the bad acts evidence and acted within its discretion in admitting it.

¶ 53 Affirmed.

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Third Judicial District
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SALT LAKE COUNTY
By ________ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

AZLEN ADIEU FARQUEIT MARCHET, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING AND ORDER ON THE STATE'S MOTION TO DISMISS** Case No. 110918502 Judge John Paul Kennedy

THIS MATTER IS BEFORE THE COURT on the State's Motion to Dismiss filed on December 12, 2011. Petitioner filed his memorandum in opposition to the State's motion on February 23, 2012. A hearing was convened on June 6, 2012, for the purpose of allowing the parties to present oral argument to the Court. Petitioner was present at this hearing, representing himself. The State was represented by Mark Field, Assistant Attorney General. The Court has reviewed the parties' memoranda, the relevant case law, and all applicable rules and statutory provisions. The Court has also carefully considered the oral arguments presented by the parties.

Now being fully advised, the Court enters the following ruling and order GRANTING the State's motion to dismiss.

Background

On April 29, 2005, the State charged Petitioner with a rape that occurred in 2002. Prior to trial, the State moved to admit testimony from three other alleged victims. The State argued that their testimony was admissible under rule 404(b) of the Utah Rules of Evidence in order to show the victim's lack of consent and Petitioner's modus operandi. Following a detailed analysis, the trial court agreed in part with the State, allowing testimony from two of the 404(b) witnesses. Petitioner was represented at trial by Gregory Skordas. Following a two-day jury trial, Petitioner was convicted as charged. At sentencing, the trial court imposed an indeterminate prison term of five years to life.

Petitioner then hired Ronald Yengich and Elizabeth Hunt, who represented him on appeal. Yengich and Hunt worked in the same firm. On appeal, Petitioner claimed that (1) the trial court erred in admitting testimony of the 404(b) witnesses; (2) the trial court erred in its jury instruction on the mental state required for rape; and (3) his trial counsel was ineffective for failing to request a mistake of fact instruction. The Court of Appeals found no error and affirmed Petitioner's conviction. *See State v. Marchet*, 2009 UT App 262, 219 P.3d 75. Petitioner sought a writ of certiorari from the Utah Supreme Court, which was denied on December 10, 2009. Approximately 18 months later, on October 18, 2011, he filed his current petition for post-conviction relief. The State filed its motion to dismiss on December 12, 2011, and Petitioner filed his memorandum in opposition on February 23, 2012. On March 19, 2012, the Court scheduled a hearing for April 9, 2012, to allow the parties to present oral argument for and against the State's motion. However, on March 23, 2012, Petitioner filed an amended petition for post-conviction relief. Oral arguments were subsequently rescheduled for June 6, 2012.

Discussion

I. Introduction

A. Petitioner's Claims

Petitioner raises eight claims for relief in his amended petition that can be grouped into the following five categories: (1) error in the admission of 404(b) evidence (claims 1, 2, 3, 5, 6, 7, and 8); (2) factual innocence (claim 2 and 3); (3) ineffective assistance of appellate counsel (claims 1, 2, 3, and 4); (4) an improper jury question (claims 6 and 7); and (5) violation of the Eighth Amendment (claim 7).

B. Legal Standards

Under the Post-Conviction Remedies Act ("PCRA"), it is Petitioner who bears "the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle [him] to relief." Utah Code § 78B-9-105(1). Rule 65C of the Utah Rules of Civil Procedure requires Petitioner to set forth "in plain and concise terms, *all of the facts* that form the basis of [his] claim to relief." Utah R. Civ. P. 65C(c)(3) (emphasis added). In doing so, he must "attach to the petition . . . affidavits, copies of records and other evidence in support of the allegations." Utah R. Civ. P. 65C(d)(1). A motion to dismiss for failure to state a claim under rule 12(b)(6) of the Utah Rules of Civil Procedure requires the Court to view the facts alleged as true, and then determine whether the facts as alleged entitle Petitioner to the relief he seeks.

II. Petitioner's Claims Are Time-Barred

The PCRA requires that all challenges to a conviction or sentence be brought "within one year after the cause of action has accrued." Utah Code § 78B-9-107(1). In the circumstances of Petitioner's case, his cause of action accrued on "the last day for filing a petition for writ of certiorari . . . in the United States Supreme Court . . . if no petition for writ of certiorari is filed." *Id.* at § 78B-9-107(2)(c), (d). The Utah Supreme Court denied Petitioner's request for certiorari review on December 10, 2009. Under United States Supreme Court Rule 13, he had 90 days after entry of this denial—March 9, 2010—to file a petition for writ of certiorari to the United States Supreme Court. He opted not to do so. Thus, Petitioner had until March 9, 2011 to file his post-conviction petition. It is undisputed, however, that his post-conviction petition was not filed until October 18, 2011, over sevens months after the date it was due under the PCRA. Therefore, all of Petitioner's claims for relief are time-barred.

Petitioner argues that, in the interests of justice, the Court should accept his petition because he was provided inaccurate advice from his appellate attorney concerning the due date of his petition, he only had limited time and access to materials in prison, and his trial counsel was not cooperative. The PCRA, however, contains no interests of justice exception to the statute of limitations. In 2008, the PCRA was amended and the Utah Legislature removed the interests of justice exception and replaced it with equitable tolling provisions. *See* 2008 Utah

Laws 1846 (removing the interests of justice exception from the PCRA). Petitioner cannot rely on a nonexistent exception to justify the untimely filing of his post-conviction petition.

In any event, even if there were an interests of justice exception, Petitioner still has not shown that the untimely filing of his petition should be excused by the Court. First, Petitioner claims that his failure to comply with the statute of limitations was due to "false information" given him by Ronald Fujino, his (apparently former) appellate counsel in case 20090349-CA. The underlying case here was case 20080186-CA. Petitioner asserts that Fujino told him that the time limit for filing a post-conviction petition had passed when it had not. In fact, however, Fujino told Petitioner that his representation of Petitioner was "limited to case no. 20090349-CA [and that] . . . he will not be able to assist [Petitioner] with 20080186-CA." September 8, 2010 Letter from Ronald Fujino at 1. Moreover, Fujino only told Petitioner that his request for an extension of time to file a petition for writ of certiorari was not timely. *See id.* Fujino never told Petitioner that the time limit for filing a petition for post-conviction relief had passed.

Second, Petitioner also argues that he was assaulted in prison, he was placed in isolation, there were multiple criminal cases he was working on, the contract attorneys were slow to respond, and prison personnel did not provide him with unspecified documents, all of which hindered his ability to file a timely petition. *See* Pet's Mem. in Opp. at 1-2. However, the prison documents Petitioner submitted in support of his argument all show disciplinary actions that took place in 2008 and 2009, well before the time to file his post-conviction petition even started. Thus, the disciplinary action during these years could not have affected Petitioner's ability to timely file his petition. Furthermore, as the Court made clear during oral argument, when the

PCRA was enacted by the Utah Legislature, it is presumed that the Legislature was aware of the difficulties a petitioner may have in filing a post-conviction petition. For this reason, the Legislature provided petitioners with a one-year statute of limitations. Thus, prison conditions standing alone cannot justify the untimely filing of Petitioner's post-conviction petition.

Based on the foregoing considerations, the Court finds that Petitioner's failure to timely file his post-conviction petition is attributable only to himself and to no one else. Therefore, all of Petitioner's post-conviction claims are time-barred, and, for this reason alone, the Court grants the State's motion to dismiss.

III. Most of Petitioner's Claims Are Also Procedurally Barred

Even assuming *arguendo* that the post-conviction petition is not time-barred, most of Petitioner's claims are, nevertheless, procedurally barred because the substance of the claims was either raised or addressed at trial or on appeal, or could have been raised at trial or on appeal, but was not. *See* Utah Code § 78B-9-106(1).

A. 404(b) Evidence

Looking beyond the labels, much of the substance of claims 1, 2, 3, 5, 6, 7, and 8 relates in varying degrees to the broader claim that 404(b) evidence was improperly admitted at trial. This claim was raised at trial and on appeal, and received a full and fair hearing at both levels. Therefore, Petitioner's claims are procedurally barred under the PCRA. *See* Utah Code 78B-9-106(1)(b) ("A person is not eligible for relief . . . upon any ground that . . . was raised or addressed at trial or on appeal.").

B. Factual Innocence

In claims 2 and 3, Petitioner argues that the victim fabricated the rape in retaliation against him and that DNA testing would exonerate him. The substance of these claims is that Petitioner did not commit the crimes charged because he allegedly never had sex with the victim. But this argument directly contradicts the defense Petitioner raised at trial, namely, that the victim consented to sex with him. *See Marchet*, 2009 UT App 262 at ¶ 15. Petitioner testified, and his counsel argued, that he was innocent based on consent, but the jury disbelieved Petitioner's testimony. Because this issue was raised at trial, these specific factual innocence claims are procedurally barred under section 78B-9-106(1)(b).

In addition, to the extent Petitioner asserts that he can establish factual innocence through DNA testing, the proper avenue for relief is a separate petition filed under section 78B-9-301 et seq. *See* Utah Code § 78B-9-104(3) ("The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA.").

C. Jury Question

In claims 6 and 7, Petitioner argues that the jury asked an improper question and that jurors based their decision on "think[ing] he's a bad guy." Amended Pet. for Post-Conviction Relief at 15. At trial, jurors did indicate that they found confusing a portion of the jury instruction informing them how to consider the 404(b) evidence, but the trial court gave, and the Court of Appeals approved, both a limiting and a clarifying instruction on the issue which explicitly told the jury "you may not convict [Petitioner] on the basis that you may find him to be a bad person." *See Marchet*, 2009 UT App 262 at ¶¶ 46-50. This issue was raised, and rejected, both at trial and on appeal, and is, therefore, procedurally barred. *See* Utah Code § 78B-9-106(1)(b).

D. Eight Amendment

In claim 7, Petitioner argues that the Salt Lake County Jail subjected him to cruel and unusual punishment by denying him adequate meals during his detention prior to trial. According to Petitioner, the inadequate meals caused him to lose both weight and memory and, presumably, impaired his ability to participate effectively in his defense. He also claims that his facing multiple rape trials so close to each other inhibited his ability to meaningfully participate in his defense. Petitioner could have, but did not, raise these claims either at trial or on appeal. Moreover, he has not alleged that his appellate counsel was ineffective in not raising these claims. Therefore, they are procedurally barred under the PCRA. *See* Utah Code § 78B-9-106(1)(c).[1]

For all of the foregoing reasons, the Court concludes that the State is entitled to a dismissal of Petitioner's claims that are procedurally barred.

IV. Insufficient Facts Have Been Alleged to Establish Ineffective Assistance of Appellate Counsel

Even if Petitioner's ineffective assistance of appellate counsel claims are not time-barred or procedurally barred, they still fail because Petitioner has not alleged sufficient facts to establish that his appellate counsel were ineffective. Petitioner specifically alleges in claims 1, 2, 3, and 4 that his appellate attorneys provided ineffective representation. According to Petitioner, his appellate counsel were ineffective for (1) failing to raise the issue that one of the 404(b) witnesses was allowed to testify that the victim and the other 404(b) witness did not testify at the first 404(b) witness's rape trial; (2) failing to raise the issue that trial counsel failed to elicit evidence or argue to the jury that the victim had fabricated her testimony and that Petitioner's prosecution was motivated by victim retaliation; (3) failing to raise the issue that trial counsel failed to properly question a witness that she had been raped by Petitioner; and (4) delegating the case to co-counsel and co-counsel failing to investigate unnamed "legitimate issues." Amended Pet. for Post-Conviction Relief at 11.

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[1] Furthermore, it is worth noting that the PCRA only establishes a remedy for challenges to a conviction or sentence. *See* Utah Code § 78B-9-102 ("This chapter establishes the sole remedy for any person who challenges a conviction or sentence."). Petitioner's claim that the Salt Lake County Jail did not provide him with adequate meals is not a challenge to his conviction or sentence and, therefore, it is not a claim that is cognizable under the PCRA. Such a claim is more properly raised as a federal civil rights action against the jail under 42 U.S.C. § 1983 or as a *petition for extraordinary* relief under rule 65B of the Utah Rules of Civil Procedure.

Petitioner bears the burden of establishing that he received ineffective representation. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984). In order to prove ineffective assistance of appellate counsel, Petitioner must show both (1) deficient performance and (2) prejudice. *Id.* at 688, 694. Deficient performance requires proof that specific acts or omissions by his counsel fell below an objective standard of reasonableness. *Id.* at 687-88, 690. Prejudice requires a showing of a reasonable likelihood of a more favorable result absent the error. *See id.* at 695.

Petitioner does not allege sufficient facts to support either deficient performance or prejudice on his claims of ineffective assistance of appellate counsel. He offers nothing but bare allegations. As to the alleged failure to challenge trial counsel's effectiveness in failing to argue victim retaliation, Petitioner has not shown that this argument had any basis in the evidence at trial. He thus cannot prove that it was unreasonable not to make the argument on appeal; nor can he show a reasonable likelihood of a more favorable result had counsel made this, arguably improper, argument. As to the alleged failure to raise ineffective assistance of trial counsel for failing to object to the admission of a portion of one of the 404(b) witness's testimony, counsel both at trial and on appeal objected to the entirety of that witness's testimony. That counsel lost the argument does not make them ineffective.

As to the case delegation, Petitioner has not shown that it was unreasonable for Yengich to relegate appellate duties to Hunt. Petitioner has not shown a reasonable likelihood of a more favorable result on appeal had Yengich conducted it personally.

Finally, as for appellate counsel's alleged failure to investigate unnamed "legitimate issues," while "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," courts evaluate "a particular decision not to investigate . . . for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. Petitioner's claim on this point fails due to lack of specificity alone—he does not say what appellate counsel failed to investigate, why the choice not to investigate was unreasonable, or how an investigation would have produced evidence reasonably likely to produce a result more favorable to him on appeal.

For the foregoing reasons, the Court finds that Petitioner has not provided sufficient facts to establish either the deficient performance or prejudice prongs of the *Strickland* test. Thus, he has not established that his appellate counsel were ineffective. The Court concludes, therefore, that the State is entitled to a dismissal of these claims.

Conclusion

All of Petitioner's claims are time-barred and fail for that reason alone. *See Clarke v. Living Scriptures, Inc.*, 2005 UT App 225, ¶ 20, 114 P.3d 602 (affirming dismissal under rule 12(b)(6) for failure to comply with statue of limitation). Many of Petitioner's claims are also procedurally barred, and those that are not procedurally barred fail because Petitioner offers only bare allegations of ineffective assistance of appellate counsel, unsupported by specific facts. For all of these reasons, the Court grants the State's motion to dismiss.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is granted.

IT IS FURTHER ORDERED that Petitioner's petition for post-conviction relief is dismissed.

This Ruling and Order constitutes the final order of the court. No further order is necessary to effectuate the Court's decision. Petitioner has 30 days from the date of entry of this order to file a notice of appeal. Ut. Rules of Appellate Procedure No. 4.

DATED this 2 day of October, 2012.

John Paul Kennedy
Third District Judge

327 P.3d 44
Court of Appeals of Utah.

Azlen Adieu Farquoit MARCHET,
Petitioner and Appellant,
v.
STATE of Utah, Respondent and Appellee.

No. 20120820–CA. | May 15, 2014.

Synopsis

Background: Petitioner sought postconviction relief. The Third District Court, Salt Lake Department, John Paul Kennedy, J., dismissed petition. Petitioner appealed.

Holding: The Court of Appeals held that petitioner's letter requesting extension of time to pursue expert counsel did not constitute petition for postconviction relief.

Affirmed.

Attorneys and Law Firms

*44 Azlen Adieu Farquoit Marchet, Appellant Pro Se.

Sean D. Reyes and Mark C. Field, Salt Lake City, Attorneys for Appellee.

Before Judges GREGORY K. ORME, STEPHEN L. ROTH, and MICHELE M. CHRISTIANSEN.

Decision

PER CURIAM:

¶ 1 Azlen Adieu Farquoit Marchet appeals the dismissal of his petition for post-conviction relief. We affirm.

¶ 2 The district court dismissed Marchet's petition for post-conviction relief after determining that it was time barred under Utah Code section 78B–9–107(1). "We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (citation and internal quotation marks omitted).

¶ 3 Utah Code section 78B–9–107(1) states that "[a] petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B–9–107(1) (LexisNexis 2012). The statute goes on to set forth the dates upon which the cause of action accrues:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

*45 (b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B–9–104(1)(f) is established.

Id. § 78B–9–107(2). Here, this court affirmed Marchet's rape conviction in 2009. Marchet then sought a writ of certiorari from the Utah Supreme Court, which was denied on December 10, 2009. Marchet had until March 9, 2010, to file a petition for writ of certiorari with the United States Supreme Court, but he did not do so. Accordingly, under the statute, Marchet was required to file his petition for post-conviction relief no later than March 9, 2011, i.e., one year after the last day for filing a petition for writ of certiorari in the United States Supreme Court, unless subsections (e) or (f) were applicable.

¶ 4 Marchet filed his petition for post-conviction relief in the district court on October 18, 2011. The State, in turn, filed a motion to dismiss arguing that the petition was time barred under section 78B–9–107. Marchet acknowledged that the petition was not filed within one year of the date he could have filed a petition for a writ of certiorari with the United States Supreme Court. However, he argued that his petition should be considered timely because on August 30, 2010, he sent a document to this court requesting "an extension of time to pursue expert counsel to appeal to the United States Supreme Court as well as 65C Post–Conviction Relief." He asserted that this document should be considered a notice of intent to petition for post-conviction relief and that it should save his petition for purposes of the statute. Marchet's argument is misplaced.

¶ 5 Marchet's August 30, 2010 letter to this court did not satisfy the requirements of the post-conviction remedies act or rule 65C of the Utah Rules of Civil Procedure. Contrary to Marchet's argument, the rule requires a petition to be filed, not a notice of an intent to file a petition. *See* Utah R. Civ. P. 65C(c). Accordingly, the August 30, 2010 letter could satisfy the time requirement of Utah Code section 78B–9–107 only if the letter qualified as a petition for post-conviction relief. It did not. First, rule 65C requires the petition to be filed in the district court "in the county in which the judgment of conviction was entered." Utah R. Civ. P. 65C(c). The letter was filed in this court, not the district court. Accordingly, the letter failed to satisfy this jurisdictional requirement. Second, the letter cannot be construed as a petition for post-conviction relief, because it contained none of the information required by rule 65C(d). *See id.* R. 65C(d). Finally, the letter was actually related to a different case and only mentioned this case as being affected by the potential result in that case. Accordingly, under the circumstances, the August 30, 2010 letter cannot be construed as a petition for post-conviction relief in order to satisfy the filing requirements of Utah Code section 78B–9–107. Because Marchet's petition for post-conviction relief was not filed until after the one-year statute of limitations had passed, the district court correctly determined that Marchet's petition was time barred.

¶ 6 Affirmed.

Parallel Citations

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

AZLEN ADIEU FARQUOIT MARCHET, Petitioner, vs. STATE OF UTAH, Respondent.	**MEMORANDUM DECISION AND ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING POST-CONVICTION PETITION** Case no. 140905584 Judge Royal I. Hansen

THIS MATTER IS BEFORE THE COURT on the State of Utah's Motion for Summary Judgment filed on April 20, 2015 in response to Petitioner Azlen Marchet's successive post-conviction petition. Marchet opposed the State's motion. On July 10, 2015, the Court heard oral argument from the parties. Marchet was present representing himself. The State was represented by Mark C. Field, Assistant Attorney General. The Court has reviewed the parties' memoranda, the relevant case law, and all applicable rules and statutory provisions. The Court has also carefully considered the oral arguments presented by the parties. Now being fully advised, the Court enters the following ruling and order GRANTING the State's motion for summary judgment and DISMISSING Marchet's petition for post-conviction relief.

Background

Marchet was charged with the rape of Brooklyn F. on April 29, 2005. At trial, Brooklyn testified, as did two prior bad acts witnesses, Melissa P. and Jessica C, under rule 404(b), Utah Rules of Evidence. Following a jury trial, Marchet was convicted as charged. He was sentenced on November 9, 2007, to the statutory prison term of five years to life. Marchet then moved for a new trial, arguing that the rule 404(b) evidence was improperly admitted. The trial court denied the motion and Marchet timely appealed. The Utah Court of Appeals affirmed Marchet's conviction. *See State v. Marchet*, 2009 UT App 262, ¶¶52-53, 219 P.3d 75.

Over 17 months later, on October 18, 2011, Marchet filed his first post-conviction petition. Marchet raised claims challenging the admissibility of the rule 404(b) evidence and the effectiveness of his appellate counsel. He also claimed that he was factually innocent, that there was an improper jury question, and that the Eighth Amendment was violated. The district court dismissed Marchet's petition because it was time-barred. Alternatively, the court ruled that the claims were either procedurally barred or that Marchet alleged insufficient facts to support his claims. Marchet timely appealed. The court of appeals affirmed the district court's dismissal of Marchet's first post-conviction petition on May 14, 2014.

On August 13, 2014, Marchet filed his second post-conviction petition collaterally challenging his conviction for the rape of Brooklyn.

Discussion

Marchet raises 16 claims challenging his rape conviction. These include claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, that his rights against self-incrimination and to confront witnesses were violated, that the prosecutor did not disclose favorable evidence, that the trial court erred in admitting hearsay testimony, and, for a variety of reasons, that the trial court erroneously admitted the rule 404(b) evidence. Marchet argues that in light of these errors, his rape conviction should be vacated and he should receive a new trial.

In response, the State contends that summary judgment is warranted on all of Marchet's claims. The State argues that Marchet's claims are time-barred under the Post-Conviction Remedies Act (PCRA) statute of limitations because they were not raised within one year from the date his post-conviction cause of action accrued. Alternatively, the State asserts that Marchet's claims are procedurally barred under the PCRA because Marchet could have raised them either on appeal or in his first post-conviction petition, but failed to do so.

For the reasons set forth below, the Court concludes that the State is entitled to summary judgment.

I. Summary Judgment Standard.

"The purpose of summary judgment is to eliminate the time, trouble, and expense of trial when it is clear as a matter of law that the party ruled against is not entitled to prevail." *Amjacs Interwest, Inc. v. Design Associates*, 635 P.2d 53, 54 (Utah 1981). To support summary judgment, the State must show that Marchet's proffer, even if believed, fails as a matter of law to entitle him to relief. *See Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39 ¶¶26-27, 284 P.3d 630. On the other hand, to survive summary judgment, Marchet must show that he "could, if given a trial [or evidentiary hearing], produce evidence which would reasonably sustain a judgment in his favor." *Archuleta v. Galetka*, 2011 UT 73,¶43, 267 P.3d 232. *See also Orvis v. Johnson*, 2008 UT 2 ¶10, 177 P.3d 600 ("Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law."). In other words, Marchet must come forward with specific facts showing that "there is a genuine issue for trial. The allegations of a pleading or factual conclusions of an affidavit are insufficient to raise a genuine issue of fact." *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984).

II. Marchet's Claims Are Time-Barred.

A post-conviction petitioner, such as Marchet, "is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1). In the circumstances of Marchet's case, his cause of action accrued on "the last day for filing a petition for writ of certiorari . . . in the United States Supreme Court . . . if no petition for writ of certiorari is filed." Utah Code Ann. § 78B-9-107(2)(c), (d). Marchet was sentenced for his rape conviction on November 9, 2007. He then timely appealed. The Utah Court of Appeals affirmed. *See Marchet*, 2009 UT App 262, ¶¶52-53. Marchet sought certiorari review from the Utah Supreme Court, which was denied on December 10, 2009. *See State v. Marchet*, 221 P.3d 837 (Utah 2009). Under United States Supreme Court Rule 13, Marchet had 90 days—until March 9, 2010—to file a petition for writ of certiorari with the United States Supreme Court.

Marchet opted not to do so. Consequently, March 9, 2010 was the date Marchet's post-conviction cause of action accrued. He then had one year—until March 9, 2011—to timely file his post-conviction petition. Marchet did not file his current post-conviction petition until August 13, 2014, over 41 months too late. His petition is therefore time-barred under the PCRA's statute of limitations.

Marchet argues, however, that a later accrual date applies. Under the PCRA, a post-conviction cause of action may also accrue on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." Utah Code Ann. § 78B-9-107(2)(e). A petitioner then has one year from that date to file his petition. *See id.* § 78B-9-107(1).

Marchet asserts that despite his efforts, his prior trial and appellate attorneys' case files were not provided to him until June 18, 2013. He asserts that these case files contained "critical pieces of evidence" that were not previously disclosed to him. In particular, Marchet points to a supplemental police report from the Sandy City Police Department. He contends that this report shows that Miguel Bridges, a friend of Melissa's, one of the rule 404(b) witnesses, met the victim, Brooklyn, in a Sandy City night club and that Brooklyn expressed to Miguel her desire to conspire with Melissa to convict Marchet of rape. According to Marchet, Miguel then placed the two in contact prior to Brooklyn ever formally reporting any rape to the police.[1]

Marchet relies on this alleged collusion between Brooklyn and Melissa as the basis for many of the claims he raises in his petition. But even calculating the post-conviction accrual date from the date Marchet actually discovered these evidentiary facts, all of his claims that rely on this evidence are still time-barred. As Marchet concedes in his petition, he learned of these evidentiary facts on June 18, 2013. He then had one year—until June 18, 2014—to timely file his second post-conviction petition. He failed to do so. Instead, he waited until August 13, 2014 to file his petition, nearly two months too late. Consequently, even for those claims that rely on evidentiary facts that Marchet allegedly only discovered on June 18, 2013, they are still time-barred.

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[1]In its summary judgment motion, the State disputed that this is what the supplemental police report said. The Court need not, and does not, resolve this issue.

Finally, Marchet raises one claim that could not have been raised on appeal or in his first post-conviction petition. He argues that the legal standard for determining the admissibility of prior acts evidence set forth in *State v. Verde*, 2012 UT 60, 296 P.3d 673, should now apply to determine whether the rule 404(b) evidence should have been admitted. According to Marchet, the rule 404(b) evidence in his case would not have been admitted under the *Verde* standard. Under the PCRA, a petitioner's conviction may be vacated if he (1) "can prove entitlement to relief under a rule announced by the . . . Utah Supreme Court . . . after conviction and sentence became final on direct appeal," and (2) shows that "the rule was dictated by precedent existing a the time of the petitioner's conviction or sentence became final." Utah Code Ann. § 78B-9-104(f)(i).

But even if *Verde* announced a new rule, Marchet's claim is still too late. *Verde* was decided on September 25, 2012. Marchet had one year from that date—until September 25, 2013—to raise a post-conviction claim based on *Verde*. Instead, he did not raise this claim until

August 13, 2014, nearly an entire year too late.

III. Marchet's Claims That Are Not Based on New Evidentiary Facts Are Procedurally Barred.

The PCRA also prohibits post-conviction relief "upon any ground that . . . could have been but was not raised at trial or on appeal . . . [or] in a previous request for post-conviction relief." Utah Code Ann. § 78B-9-106(1)(c), (d). Procedural bars accommodate society's compelling interest in the finality of judgments by requiring a petitioner to raise, during the trial process, on direct appeal, or in a subsequent collateral proceeding, all of the errors that allegedly occurred. *See State v. Litherland*, 2000 UT 76, ¶¶11, 16-17, 12 P.3d 92. If he does not, then he generally cannot get belated relief on post-conviction review. *See Loose v. State*, 2006 UT App 149, ¶¶10-15, 135 P.3d 886 (affirming procedural bar of claims of ineffective assistance of counsel that were not, but could have been, raised on direct appeal). This is all the more evident in the case of a second petition where the claims could have been raised in a previously filed post-conviction petition.

To the extent Marchet's claims are not based on the new evidentiary facts that were disclosed on June 18, 2013, they are procedurally barred. For those claims, all the evidentiary facts on which Marchet relies to make his arguments were known to him at the time he filed his direct appeal on March 4, 2008, and certainly no later than October 18, 2011 when he filed his first post-conviction petition. These facts include witnesses' trial testimony, the jury instructions, and actions by the trial court with respect to the rule 404(b) hearing. Because Marchet knew all the facts he needed to know to raise these claims either on direct appeal or in his first post-conviction petition, those claims are now procedurally barred under the PCRA.

Conclusion

For the foregoing reasons, the Court concludes that Marchet's post-conviction claims are either time-barred, procedurally barred, or both. The State is therefore entitled to judgment as a matter of law.

ORDER

IT IS HEREBY ORDERED that the State's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that Petitioner Azlen Marchet's petition for post-conviction relief is DISMISSED with prejudice.

This Memorandum Decision and Order constitute the final order of the Court. No further order is necessary to effectuate the Court's Decision.

In accordance with rule 10(e), Utah Rules of Civil Procedure, the Judge's electronic signature appears at the top of the first page of this Order. END OF DOCUMENT

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UTAH APPELLATE COURTS
FEB 11 2016

2016 UT App 28

THE UTAH COURT OF APPEALS

AZLEN ADIEU FARQUOIT MARCHET,
Appellant,
v.
STATE OF UTAH,
Appellee.

Per Curiam Decision
No. 20151024-CA
Filed February 11, 2016

Third District Court, Salt Lake Department
The Honorable Royal I. Hansen
No. 140905584

Azlen Adieu Farquoit Marchet, Appellant Pro Se

Sean D. Reyes and Mark C. Field, Attorneys for Appellee

Before JUDGES GREGORY K. ORME, STEPHEN L. ROTH, and MICHELE M. CHRISTIANSEN.

PER CURIAM:

¶1 Azlen Adieu Farquoit Marchet appeals the dismissal of his second petition for post-conviction relief. We affirm.

¶2 This court affirmed Marchet's conviction of rape. *See State v. Marchet*, 2009 UT App 262, ¶ 1, 219 P.3d 75. Over seventeen months later, Marchet filed his first petition under the Post-Conviction Remedies Act (PCRA). *See* Utah Code Ann. §§ 78B-9-101 to 109 (LexisNexis 2012). This court affirmed the district court's dismissal of that first petition because it was time-barred. *See Marchet v. State*, 2014 UT App 108, ¶ 1, 327 P.3d 44 (per curiam). Marchet then filed his second post-conviction petition over forty-one months after his conviction became final, claiming that his trial and appellate attorneys were ineffective, his constitutional rights were violated, the State withheld evidence, and the trial court erroneously admitted prior acts evidence. Marchet argued that some claims in the second petition were based upon evidence that he had recently discovered. The State moved for summary judgment on the basis that the claims were time-barred, *see* Utah Code Ann. § 78B-9-107(1), and that any claims not relying on alleged newly discovered evidence were also procedurally barred, *see id.* § 78B-9-106(1)(c).

¶3 The district court dismissed Marchet's second petition for post-conviction relief after determining that all of his claims were either time-barred or procedurally barred. "We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (citation and internal quotation marks omitted).

¶4 A post-conviction petitioner "is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1). The district court correctly found that Marchet's cause of action under the PCRA accrued on "the last day for filing a petition for writ of certiorari . . . in the United States Supreme Court . . . if no petition for writ of certiorari is filed." *Id.* § 78B-9-107(2)(c). The district court determined that date to be March 9, 2010, and found that Marchet had one year—until March 9, 2011—to timely file his post-conviction petition. Marchet did not file his second post-conviction petition until August 13, 2014. Accordingly, the second petition was time-barred under the PCRA's statute of limitations for the same reason that the first petition was time-barred.

¶5 Marchet argued that an exception to the PCRA's statute of limitations should apply to his second petition. Marchet claims that his cause of action did not accrue until he obtained his prior trial and appellate attorneys' case files on June 18, 2013. He asserted that these case files contained evidence not previously disclosed to him that entitled him to assert the exception to the time bar contained in Utah Code section 78B-9-107(2)(e). *See id.* § 78B-9-107(2)(e) (stating that a cause of action accrues on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition was based"). Under this exception, Marchet had one year from the date of discovery in which to file a petition. *See id.* § 78B-9-107(1). The district court correctly concluded that "even calculating the post-conviction accrual date from the date Marchet actually discovered these evidentiary facts, all of his claims that rely on this evidence [were] still time-barred." Because Marchet conceded in the petition that he learned of these evidentiary facts on June 18, 2013, he had one year—until June 18, 2014—to timely file his second post-conviction petition. Because Marchet filed the second petition on August 13, 2014, the claims that relied upon evidentiary facts discovered in June 2013 are still time-barred under the PCRA. Furthermore, the district court ruled that, to the extent Marchet's claims were not based on the allegedly newly discovered evidentiary facts disclosed on June 18, 2013, the claims were also procedurally barred because all of the facts on which Marchet relied were known when he filed his direct appeal, i.e., facts from the trial testimony, the jury instructions, and the rule 404(b) hearing. Because those claims could have been raised on direct appeal, they were procedurally barred under the PCRA.[1]

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1. Although the district court also found that those claims could have been raised in the first post-conviction petition, it should be noted that this court affirmed the dismissal of that petition as time-barred. *See Marchet v. State*, 2014 UT App 108,¶ 1, 327 P.3d 44 (per curiam). Therefore, it would have been futile to include the claims in question in the first petition.

¶6 The district court found that Marchet raised one claim in the second post-conviction petition that could not have been raised on appeal or in his first post-conviction petition. Marchet argued that the legal standard for determining the admissibility of prior acts evidence set forth in *State v. Verde*, 2012 UT 60, 296 P.3d 673, which issued on September 25, 2012, should now apply to his case and that the evidence would not have been admitted if *Verde* applied. Under the PCRA, petitioners may obtain relief if they "can prove entitlement to relief under a rule announced by the . . . Utah Supreme Court . . . after conviction and sentence became final on direct appeal" and also show that "the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code Ann. § 78B-9-104(1)(f) (LexisNexis 2012). The district court ruled that even if *Verde* announced a new rule, Marchet's claim is still too late because the second post-conviction petition was not filed by September 25, 2013, which was the date one year from the issuance date of the *Verde* opinion.[2] Marchet's second post-conviction petition was untimely under this exception.

¶7 Marchet has not demonstrated that the district court erred in dismissing his claims as time-barred even if they were based on newly discovered evidentiary facts or subsequently decided case law. To the extent that the claims were not allegedly based upon new evidentiary facts, the district court correctly concluded those claims were procedurally barred because they

2. Because the second post-conviction petition was untimely even if the exception contained in Utah Code section 78B-9-104(1)(f) applied, the parties did not call upon either the district court or this court to determine whether *Verde* announced a new rule that was "dictated by precedent existing at the time [Marchet's] conviction or sentence became final." *See Winward v. State*, 2015 UT 61, ¶ 2, 355 P.3d 1022 (quoting Utah Code section 78B-9-104(1)(f)(i), *petition for cert. filed*, Oct. 27, 2015 (No. 15-924).

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of February, 2016, a true and correct copy of the attached DECISION was sent by standard or electronic mail to be delivered to:

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Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 140905584
APPEALS CASE NO.: 20151024-CA

could have been raised on direct appeal. Accordingly, because the district court correctly applied the provisions of the PCRA, we affirm the dismissal of Marchet's second post-conviction petition.

The Order of the Court is stated below:
Dated: June 15, 2016 /s/ Thomas R. Lee
03:10:45 PM Associate Chief Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Azlen Adieu Farquoit Marchet, Petitioner, v. State of Utah, Respondent.	ORDER Appellate Case No. 20160255-SC

----ooOoo----

This matter is before the Court upon a Petition for Writ of Certiorari, filed on April 13, 2016.

The Petition for Writ of Certiorari is denied.

End of Order - Signature at the Top of the First Page

FILED
UTAH APPELLATE COURTS

JUN 21 2016

SYS_HYPERTEXT;

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

AZLEN ADIEU FARQUOIT MARCHET,
Petitioner,

v.

STATE OF UTAH,
Respondent.

NOTICE OF DECISION

Appellate Case No. 20160255-SC

----ooOoo----

The above-entitled case was submitted to the court for decision and the attached order has been issued.

Order Issued: June 15, 2016

Notice of Decision Issued: June 21, 2016

Record: None

THIRD DISTRICT, SALT LAKE, #140905584

Andrea R. Martinez
Clerk of Court

By ______________
Judicial Assistant

June 21, 2016
Date

STATE OF UTAH SUPREME COURT JAN 4, 1896

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, true and correct copies of the foregoing ORDER and NOTICE OF DECISION was deposited in the United States mail or was sent by electronic mail to be delivered to:

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and a true and correct copy of the foregoing ORDER and NOTICE OF DECISION was sent by electronic mail to the court(s) listed below:

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By Marilyn Hammond
Judicial Assistant

Case No.: 20160255-SC
THIRD DISTRICT, SALT LAKE, #140905584
Court of Appeals Case No. 20151024-CA

Conclusion

All of Petitioner's claims are time-barred and fail for that reason alone. *See Clarke v. Living Scriptures, Inc.*, 2005 UT App 225, ¶ 20, 114 P.3d 602 (affirming dismissal under rule 12(b)(6) for failure to comply with statue of limitation). Many of Petitioner's claims are also procedurally barred, and those that are not procedurally barred fail because Petitioner offers only bare allegations of ineffective assistance of appellate counsel, unsupported by specific facts. For all of these reasons, the Court grants the State's motion to dismiss.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is granted.

IT IS FURTHER ORDERED that Petitioner's petition for post-conviction relief is dismissed.

This Ruling and Order constitutes the final order of the court. No further order is necessary to effectuate the Court's decision. Petitioner has 30 days from the date of entry of this order to file a notice of appeal. Ut. Rules of Appellate Procedure No. 4.

DATED this 2 day of October, 2012.

John Paul Kennedy
Third District Judge

THIRD DISTRICT COURT SALT LAKE CITY STATE OF UTAH